SHIRLEY AND PEARL WARNER

IBLA 90-282 Decided January 15, 1993

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting color-of-title application MIES 40630.

Affirmed.

1. Color or Claim of Title: Generally--Color or Claim of Title: Applications

A class 1 color-of-title claim requires proof that the land has been held in good faith and in peaceful adverse possession by a claimant, his ancestors, or grantors for more than 20 years, under claim or color of title based on a document from a party other than the United States which on its face purports to convey the claimed land to the applicant or the applicant's predecessors, and that valuable improvements have been placed on the land or some part of the land has been reduced to cultivation. An applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory requirements for purchase under the Act have been met, and a failure to carry the burden of proof with respect to one of the requirements is fatal to the application.

2. Color or Claim of Title: Generally--Color or Claim of Title: Applications

Because there can be no peaceful, adverse possession where the applicant's chain of title commences at a time when the land was withdrawn or reserved for Federal purposes, a color of title application is properly rejected where the applicant fails to produce a document which on its face purports to convey the claimed land prior to the time the land was reserved as a national forest.

3. Color or Claim of Title: Applications--Color or Claim of Title: Cultivation--Color or Claim of Title: Improvements

A class 1 color-of-title application must be rejected where no valuable improvements have been placed on the land and no part of the land has been reduced to cultivation.

APPEARANCES: George G. Wood, Esq., Manistique, Michigan, for appellants.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Shirley and Pearl Warner have appealed from a March 12, 1990, decision of the Eastern States Office, Bureau of Land Management (BLM), rejecting their color-of-title application (MIES 40630) for an island
in Straits Lake, described as Tract 37, T. 44 N., R. 18 W., Michigan Meridian, Schoolcraft County, Michigan.

On March 10, 1989, Shirley Warner filed an application under the Color of Title Act, as amended, 43 U.S.C. § 1068 (1988), asserting color of title to a 6.54 acre island in Straits Lake. 1/ He claimed the island based on a November 1, 1944, 2/ quitclaim deed from the Bay de Noquet Company to Warner and his wife, Pearl, which described the conveyed land as an "[u]nsurveyed island being 950 feet more or less in length and 300 feet more or less in width located in Straits Lake approximately 400 feet from the east shore line and situated in the SW-SE of Section 30 and the NW-NE of Section 31, Township 44 North, Range 18 West." Warner indicated that he first learned that he did not have clear title in 1981 from the U.S. Forest Service (Forest Service). The application acknowledged that no improvements had been added to the land, except for periodic "island brushing and clean up," and that no part of the land had ever been cultivated. In an affidavit attached to the application, Warner asserted that he had paid taxes on the island from 1951 through 1980, and that, as a result of his request to BLM, the island had been surveyed. 3/

By letter dated March 22, 1989, BLM advised Warner, through counsel, that his application did not appear to qualify as a class 1 color-of-title claim due to the lack of improvements or cultivation, or as a class 2 claim

1/ The application did not specify whether it was a class 1 or a class 2 application. In a cover letter accompanying the application, counsel for the Warners indicated that he believed that class 1 was the proper type, but acknowledged that the land lacked valuable improvements and cultivation.
2/ Although the application gave June 27, 1950, as the date of the quitclaim deed, that was the date the deed was recorded, not the date it was executed.
3/ The Aug. 3, 1988, survey plat designates the island as Tract 37 containing 3.42 acres.

because the chain of title and payment of taxes did not originate before January 1, 1901. 4/

In March 1989, BLM learned that the Hiawatha National Forest claimed the surface of the island pursuant to a January 16, 1931, Presidential Proclamation (No. 1931) which reserved and set apart the designated Federal land, including T. 44 N., R. 18 W., Michigan Meridian, as the Hiawatha National Forest. By letter dated August 1, 1989, BLM requested that Warner itemize all record and nonrecord title conveyances in chronological order from the first known conveyance of the island on the enclosed form, and file that form with BLM. Warner submitted the requested information in September 1989, listing the November 1, 1944, quitclaim deed as the first conveyance of the island in his chain of title.

By letter dated October 3, 1989, after noting that Warner's claim of title began with the November 1, 1944, deed from the Bay de Noquet Company, BLM asked Warner to provide the source of Bay de Noquet's title to the island.

Counsel for Warner responded by letter dated October 31, 1989, stating that he had not yet had the time to conduct the exhaustive search necessary to discover whether a conveyance to the Bay de Noquet Company specifically referring to the island existed. He contended, however, that many years earlier, the Schoolcraft County Abstract Office had researched the question of ownership of the island and had determined that Bay de Noquet had title to the island. As evidence of the chain of title to other land Warner had purchased from Bay de Noquet, he enclosed a copy of a November 28, 1928, deed from Stearns Coal and Lumber Company to Bay de Noquet conveying 811.61 acres in sections 30 and 31, including land along the shore of Straits Lake. This conveyance did not describe the island.

On November 22, 1989, BLM advised Warner that the November 28, 1928, deed from Stearns Coal and Lumber Company to Bay de Noquet did not include a conveyance of the island. BLM informed Warner that the Hiawatha National Forest was claiming the island pursuant to the 1931 Presidential Proclamation, and that unless Warner could provide proof of a conveyance predating the 1931 proclamation, the island would be considered part of the Hiawatha National Forest and any claim of ownership would have to be presented to the Forest Service, not BLM. BLM requested that Warner notify it of the status of his search for an early recording of the island in the chain of title.

By letter dated November 29, 1989, Warner apprised BLM that the Schoolcraft County Abstract Office was continuing its search for earlier

---

4/ BLM mentioned, however, that the claim might qualify under section 3 of the Michigan Public Lands Improvement Act of 1988, P.L. 100-537, 102 Stat. 2711 (Oct. 28, 1988), and indicated that, after appropriate procedures had been developed, it would notify Warner of any additional requirements under that Act.

conveyances of the island and that he would contact BLM when he received a report from that office. Although further communications between Warner and BLM followed, no additional information concerning the chain of title to the island was submitted.

On February 8, 1990, BLM reminded Warner that unless proof of a conveyance predating the 1931 proclamation was provided, the island would be considered part of the Hiawatha National Forest. BLM informed Warner that no further action would be taken on his application until the search for a pre-1931 conveyance was completed.

By letter dated February 27, 1990, Warner expressed his opinion that the Presidential proclamation was not determinative of the issues raised by the application, and indicated his intention to proceed with appropriate legal action. He did not submit any evidence of a pre-1931 conveyance of the island.

By decision dated March 12, 1990, BLM rejected Warner's color-of-title application. After noting that Warner had not specified whether his claim was a class 1 or a class 2 claim, BLM found that he had failed to satisfy the requirements of either class. BLM explained that to qualify under a class 1 claim, the applicant had to establish both a chain of title to the land for more than 20 years and improvements or cultivation on some part of the land. Because the only improvements identified on Warner's application was island brushing and cleanup and the mere cutting of underbrush did not qualify as an improvement sufficient to support a color-of-title claim, BLM determined that the application did not qualify as a class 1 claim.

BLM also concluded that Warner had not fulfilled the requirements for a class 2 claim. BLM stated that a class 2 claim required an unbroken chain of title originating before January 1, 1901, and the payment of taxes during the entire period. Since the island had not been placed on the tax rolls until 1951, and taxes would not have been paid prior to that time, BLM found that Warner had not proven that taxes had been paid for the requisite time period.

BLM further noted that the Hiawatha National Forest was claiming the surface estate of the island pursuant to a 1931 proclamation by President Hoover, and that a color-of-title claim was not held in peaceful, adverse possession if it had been initiated while the land was withdrawn or reserved for Federal purposes. BLM explained that to establish a valid color-of-title claim, Warner was required to demonstrate that his chain of title arose before the 1931 proclamation reserving the island for the Hiawatha National Forest, and his inability to prove that his claim to the island predated 1931 precluded approval of the application. BLM therefore rejected Warner's application for failure to show to the satisfaction of the Secretary of the Interior that the requirements of the Color of Title Act had been satisfied.

In an appeal filed on behalf of both Shirley and Pearl Warner, counsel for the Warners argues that the Warners have actual title to the island

because the patents of the land along the shore of Straits Lake issued by the United States to their predecessors in title also included the island even though the island was neither surveyed nor described in the patents. 5/ Counsel further alleges that the Schoolcraft County Abstract Office advised the Warners in 1955 that they held title to the island. Counsel also contends that equitable considerations support granting the Warners' application. According to counsel, not only did the Warners place the island on the tax rolls and pay the assessed taxes, but the United States Government did not assert title to the island and failed to survey it until the Warners requested a survey. Thus, counsel asserts, the Warners' application has both a legal and an equitable foundation. 6/

BLM has submitted information documenting actions taken by the Forest Service between 1970 and 1980 on Warner's claim to the island. The submission includes several legal opinions prepared by the Office of the General Counsel, U.S. Department of Agriculture, concluding that the patents to the shore of Straits Lake did not pass title to the island and that the island, therefore, remains the property of the United States.

[1] The Color of Title Act, 43 U.S.C. § 1068 (1988), sets forth the requirements that must be met by a claimant in order to receive a patent under the Act:

> The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, or (b) may, in his discretion, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for the period commencing not later than January 1, 1901, to the date of application during which time they have paid taxes levied on the land by State and local governmental units, issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than $1.25 per acre * * *.

The method for obtaining a patent outlined in subsection (a) of 43 U.S.C. § 1068 (1988) is known as a class 1 claim; a claim under part (b) is defined as a class 2 claim. 43 CFR 2540.0-5(b). A claim of title supporting a color-of-title application must be based on an instrument from a source other than the United States, which on its face purports to convey the claimed land. See, e.g., Ramona & Boyd Lawson, 94 IBLA 220, 225 (1986).

---

5/ Although the original survey notes mention the island and the island is shown on the 1856 survey plat, the island was not surveyed at that time.

6/ Although counsel has requested a hearing, we find that no disputed facts warranting a hearing exist and deny that request.

An applicant under the Color of Title Act has the burden of proof to establish to the Secretary of the Interior's satisfaction that the statutory requirements for purchase under the Act have been met. John P. & Helen S. Montoya, 113 IBLA 8, 13-14 (1990); Hal H. Memmott, 77 IBLA 399, 402 (1983); Corinne M. Vigil, 74 IBLA 111, 112 (1983); Jeanne Pierresteguy, 23 IBLA 358, 83 I.D. 23 (1975); Homer W. Mannix, 63 I.D. 249 (1956). The applicant must establish that each of the requirements for a class 1 claim has been met. A failure to carry the burden of proof with respect to one of the elements is fatal to the application. See Hal H. Memmott, supra; Lester and Betty Stephens, 58 IBLA 14 (1981).

As an initial matter, we note that to the extent the Warners argue that the island was included in the patents of the shore land, that issue is not properly raised in a color-of-title application. Jerome L. Kolstad, 93 IBLA 119, 122 (1986). A color-of-title applicant may not contest Government ownership of the land sought. Loyla C. Waskul, 102 IBLA 241, 244 (1988), and cases cited therein. By filing a color-of-title application, the applicant necessarily concedes that title to the land is in the United States and seeks to have the United States convey actual title to him. The applicant thus cannot assert that his color of title derives from a patent issued by the Government because, if true, the applicant would possess actual title, not color of title. Jerome L. Kolstad, supra. 7/

[2] The Warners' chain of title to the island arose with the November 1, 1944, quitclaim deed from Bay de Noquet to the Warners specifically describing the island. This deed is the only instrument in the record which on its face purports to convey title to the island.
In 1931, however, the island was reserved for the Hiawatha National Forest. A claim is not held in peaceful, adverse possession as required by the Color of Title Act if the applicant's chain of title originated at a time when the land was withdrawn or reserved for Federal purposes. 43 CFR 2540.0-5; Arizona Real Estate Exchange, Inc., 94 IBLA 1, 6 (1986); Grant F. & Jessie Fern Woodward, 87 IBLA 118, 120 (1985). Since the Warners have failed to trace their claim of title to a conveyance predating the 1931 reservation of the island, we conclude that they have failed to establish peaceful, adverse possession dating from a time when the lands were available and that BLM properly rejected their color-of-title application. 8/

---

7/ If the Warners wish to assert that they have actual title to the island at issue, they must do so in an action directly challenging the survey of the island, not in a collateral attack through the present proceeding. See Loyla C. Waskul, supra.

8/ The Warners' inability to track their claim of title to a conveyance before the 1944 quitclaim deed, as well as their admission that the island was not placed on the tax rolls until 1951, precludes them from fulfilling the class 2 claim requirements of holding and paying taxes on the island for a period commencing not later than Jan. 1, 1901. See 43 CFR 2540.0-5(b).

[3] The Warners' claim to the island fails for an additional reason. Under the Color of Title Act, the land being sought must contain valuable improvements or part of it must be reduced to cultivation. 43 U.S.C. § 1068 (1988). The Warners admit that the island has not been cultivated and that no valuable improvements have been added to the land except for periodic "island brushing and cleanup." Although brush clearing may, in limited circumstances, satisfy the requirement for improving the land if that activity has enhanced the value of the land, Jerry G. Perry, 85 IBLA 93, 94-95 (1985), the Warners have neither claimed nor demonstrated that the brushing and cleanup have increased the value of the island. Accordingly, we find that the Warners have failed to prove that the island contains valuable improvements or that part of it has been reduced to cultivation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge